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NEW DOL OVERTIME REGULATIONS: ARE YOU READY?

By: *Stephanie C. Moore*
and *Joseph F. Lavigne*

On April 23, 2004, the Department of Labor (“DOL”) issued its final version of the regulations governing which employees are entitled to overtime. These rules go into effect on August 23, 2004. There are some significant changes with regard to the overtime regulations covering executive, administrative, professional, outside sales, and computer employees, typically known as “white collar” employees. This article briefly summarizes the changes made to the regulations; further information can be gathered from the DOL’s website at www.dol.gov. Please review the new regulations and contact one of our attorneys if you need any assistance preparing for the changes. Please note that the weekly minimum salary for white collar workers will be revised to \$455 per week. This may exclude certain employees that are currently classified as salaried exempt.

Executive Exemption – 29 CFR §§ 541.100-106

The DOL’s new regulations regarding the executive exemption eliminate both the short and long tests in favor of one standard duties test. The minimum salary requirement also has been raised to \$455 per week, which is \$23,660 per year. Additionally, the DOL added a new requirement to the executive exemption that an executive must have the authority to hire and fire or have his suggestions regarding hiring and firing carry “particular weight.”

Under the new regulations, employees meeting the executive exemption must:

- receive compensation on a salary basis at a rate of at least \$455 per week;
- as a primary duty, manage the enterprise or manage a customarily recognized department or subdivision of the enterprise;
- customarily and regularly direct the work of at least two or more other full-time employees (or the equivalent of two full-time employees);¹ and

¹ For example, four part-time employees who collectively work 80 hours a week would be equivalent to two full-time employees.

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- have the authority to hire and fire employees *OR* have particular weight given to their suggestions and recommendations regarding hiring, firing, advancement, promotion, or any other change in status of other employees.

“Particular Weight” – 29 CFR § 541.105

To determine whether an employee’s suggestions and recommendations are given “particular weight,” the following factors are considered:

- whether it is a part of the employee’s job duties to make such suggestions and recommendations;
- the frequency with which the employee’s suggestions and recommendations are made or requested;
- the frequency with which the employee’s suggestions and recommendations are relied upon.

In the preamble to the new regulations, the DOL explains that evidence that an employee’s recommendations are given particular weight could include:

- witness testimony that the recommendations were made and considered;
- the exempt employee’s job description listing this as an area of responsibility;
- performance reviews documenting the exempt employee’s abilities in this area;
- employment documents regarding promotions, demotions, or other changes in status revealing the exempt employee’s role in the decision making process.

Administrative Exemption – 29 CFR §§ 541.200-204

Under the new regulations, to qualify for the administrative exemption an employee must meet the following requirements:

- receive compensation at a rate of at least \$455 per week on a salary or fee basis;

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- primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer’s customers; and
- primary duty must include the exercise of discretion and independent judgment with respect to “matters of significance.”

“Work Related to the Management or General Business Operations” – 29 CFR § 541.201

The DOL describes work that is “directly related to the management or general business operations” as including, but not limited to, work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and similar activities. 29 CFR § 541.201(b). Additionally, employees may qualify for this exemption if their primary duty is the performance of work that is directly related to the management or general business operations of the employer’s customers (i.e., tax experts or financial consultants). 29 CFR § 541.201(c).

“Discretion and Independent Judgment” – 29 CFR § 541.202

The regulations list specific factors to consider in deciding whether an employee exercises discretion and independent judgment, including whether the employee:

- has the authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to the operation of a particular segment of the business;

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- has authority to commit the employer to matters that have a significant financial impact;
- has the authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- provides consultation or expert advice to management;
- is involved in planning long or short term business objectives;
- investigates and resolves matters of significance on behalf of management; and
- represents the company in handling complaints, arbitrating disputes, or resolving grievances.

29 CFR § 541.202(b). An employee will not lose the exemption merely because his decisions or recommendations are reviewed at a higher level. 29 CFR § 541.202(c). Moreover, the fact that many employees perform the same or similar work does not mean that each of those employees does not exercise discretion and independent judgment. 29 CFR § 541.202(d).

Likewise, an employee who has to consult a technical or other complex manual to perform his assigned job duties will not lose the administrative exemption for this reason alone, unless the manual limits the employee's discretion by essentially telling the employee how a particular situation must be handled or resolved. 29 CFR § 541.202(c).

Administrative Exemption Examples – 29 CFR § 521.203

The new regulations list examples of modern jobs that meet the administrative exemption:

- insurance claims adjusters;
- financial services industry employees;
- team leaders assigned to complete major projects for the employer (such as purchasing, selling, or closing all or part

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of a business, negotiating a real estate transaction or a collective bargaining agreement, etc.);

- executive assistants with substantial independent authority;
- human resources managers; and
- purchasing agents.

29 CFR § 541.203(a)-(f).

The DOL also specifies in the regulations the following job categories that typically **will not meet** the administrative exemption:

- inspectors;
- examiners or graders (*i.e.*, employees who grade lumber);
- comparison shoppers; and
- public sector inspectors or investigators (*i.e.*, fire, building, construction, and health inspectors).

29 CFR § 541.203(g)-(j).

Professional Exemption – 29 CFR §§ 541.300-304

Learned Professional – 29 CFR § 541.301

To qualify for the learned professional exemption under the new regulations, an employee must meet the following requirements:

- receive compensation on a salary or fee basis at a rate of at least \$455 per week;
- primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and includes the consistent exercise of discretion and judgment;
- the advanced knowledge must be in a field of science or learning; and

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- the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

29 CFR § 541.300-301.

Some examples of jobs that meet the learned professional exemption are:

- registered or certified medical technologists;
- registered nurses;
- dental hygienists;
- physician assistants;
- certified public accountants;
- executive and sous chefs (if they have a four-year specialized degree);
- athletic trainers (if they have successfully completed four academic years of preprofessional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and are certified by the Board of Certification of the National Athletic Trainees Association Board of Certification); and
- funeral directors and embalmers who are licensed by and working in a state with a four-year academic study requirement.

29 CFR § 541.301(e).

Creative Professional – 29 CFR § 541.302

To qualify for the creative professional exemption under the new regulations, an employee must meet the following requirements:

- receive compensation on a salary or fee basis at a rate of at least \$455 per week; and
- primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized

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field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work.

Some examples of work in a “recognized field of creative or artistic endeavor include music, writing, acting, and graphic arts.” 29 CFR § 541.302(a)-(b). Determination of exempt status for creative professionals must be made on a case-by-case basis. However, generally, actors, musicians, composers, conductors, soloists, painters, cartoonists (who are merely given a title or underlying concept), essayists, novelists, short-story writers, and screenplay writers (who choose their own subject and turn in a finished product) meet the exemption. 29 CFR § 541.302(c). Generally, copyists, animators, and photograph “retouchers” do not meet the creative professional exemption because their work is not “creative in character.” Id.

Journalists may meet the exemption if their work requires invention, imagination, originality, or talent. Some examples of exempt journalists include journalists whose primary work is performing on the air in radio, television, or other electronic media and those who conduct investigative interviews, analyze or interpret public events, write editorials, opinion columns, or other commentary, or act as narrators or commentators. 29 CFR § 541.302(d). On the other hand, journalists who merely collect, organize, and record information that is routine or already public will not qualify for this exemption.

Computer Employees – 29 CFR §§ 541.400-402

To qualify for the computer professional exemption, an employee must meet all of the following requirements:

- receive compensation on a salary or fee basis at a rate of not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 per hour; and
- be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field whose primary duties consist of:
 1. the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

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2. the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. the design documentation, testing, creation, or modification of computer programs related to machine operating systems; or
4. a combination of these duties, the performance of which requires the same level of skill.

29 CFR § 541.400(b).

The exemption **does not** include employees engaged in the manufacture or repair of computer hardware or engineers or drafters whose work is facilitated by the use of computers and computer software programs but who are not otherwise engaged in computer systems analysis and programming. 29 CFR § 541.401.

Outside Sales Exemption – 29 CFR §§ 541.500-504

To qualify for the outside sales exemption under the new regulations, an employee must meet the following requirements:

- primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities (*i.e.*, selling time on radio or television) for which consideration (money) will be paid by the client or customer; and
- must be customarily and regularly engaged away from the employer's place or places of business.

Unlike the other exemptions, outside sales employees are **not** required to meet the \$455 per week minimum salary. 29 CFR § 541.500.

Furthermore, the new regulations provide that “work incidental to and in conjunction with the employee’s own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.” 29 C.F.R. § 541.500(b). The new regulations further state that “other work that furthers the employee’s sales efforts also shall be regarded as exempt work including, for example, writing sales reports,

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updating or revising the employee’s sales or display catalogue, planning itineraries and attending sales conferences.” Id.

Away From Employer’s Place of Business – 29 CFR § 541.502

The outside sales exemption does not apply to those who perform “inside sales” – sales that are made at a home or office. The new regulation modernizes what does and does not fit the definition of outside sales. Outside sales are made at the customer’s place of business or at the customer’s home, if the sales person is selling door-to-door. “Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls.” 29 CFR § 541.502. The new regulation also makes clear that an outside sales person does not lose the exemption by displaying samples in hotel sample rooms during trips in other cities or by displaying the employer’s products at a trade show.

Drivers Who Sell – 29 CFR § 541.504

The new regulations state that drivers who deliver and sell products qualify as exempt if their primary duty is making sales. Work performed incidental to, and in conjunction with, the employee’s own outside sales or solicitations, including loading, driving, or delivering products, will be regarded as exempt outside sales work. 29 CFR § 541.504(a).

Drivers who may qualify for this exemption include those who:

- provide the only sales contact between the employer and customers;
- call on customers and take orders for products;
- deliver products from stock in the employee’s vehicle or deliver the product on a later trip;
- receive compensation based on the volume of products sold;
- obtain or solicit orders for the employer’s products from an employee of the customer who has the authority to commit the customer to purchases;
- call on new prospects for customers and attempt to convince them to accept regular delivery of goods; or

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- call on established customers and persuade them to accept delivery of new products even though the initial sale was made by someone else.

29 CFR § 541.504(a)-(c).

A driver generally will **not** qualify as an exempt outside sales employee if:

- his primary duty is to transport products sold by the employer through vending machines;
- he routinely calls on established customers delivering a set amount of products; or
- he is primarily engaged in performing activities to promote sales for the customer (*i.e.*, placing advertising materials, arranging merchandise on shelves, rotating stock, or servicing display cases).

29 CFR § 541.504(d).

Highly Compensated Employees – 29 CFR § 541.601

Under the new regulations, a “highly compensated employee” must earn \$100,000 per year, with at least \$455 per week of that \$100,000 being paid on a salary or fee basis (as opposed to hourly pay). If an employee is considered by the employer to be a highly compensated employee, but will fall short of the \$100,000 annual minimum, the employer can make a payment to the employee during the final pay period of the year, or within one month of the year’s end, to bring the annual compensation up to the \$100,000 minimum. An employee who does not work a full year may qualify for the exemption based on a pro rata portion of the minimum.

An employee is exempt under this section if the employee meets the salary requirement and “customarily and regularly” performs any *one* of the duties outlined in the executive, administrative, or professional exemptions. It is also important to note that this section only applies to white collar employees. Workers such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers, and other similar employees *are not* exempt under this section *no matter how well compensated they may be*.

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ACTION PLAN

With the implementation of these new regulations, what steps should you take to ensure your company is in compliance with the new requirements? Here are action items you should consider:

1. Evaluate all of your employees, their job titles, and salary levels to determine who falls below the \$23,660 threshold for overtime.
2. Review all of your job descriptions or create them if needed. Investigate whether they reflect the actual work being performed by your employees either by observing the employees at work or by interviewing supervisors who observe the employees on a daily basis. The job descriptions should list the most important or time-consuming duties first. Watch for discrepancies between the written job description and the employees' duties. These employees may need to be reclassified.
3. Consider modifying work duties or hiring additional employees to reduce your overtime payments if financially necessary.
4. Review your record-keeping practices regarding recording hours worked, payment of overtime, and deductions.
5. Develop a written policy reflecting the company's commitment to compliance with wage and hour laws. Remember, the policy should include a complaint mechanism and should be distributed to all employees along with other necessary new-hire paperwork. It should also be placed on employee bulletin boards and added to your employee handbooks.
6. Finally, train your managers to comply with overtime requirements and how to report and/or handle employee complaints.

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JOHN D. WHITE³
ROBERT B. WORLEY, JR⁶

¹ Also admitted in Mississippi

² Also admitted in Florida

³ Only admitted in Texas

⁴ Also admitted in Virginia

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